

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD KATZ	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONAL BOARD OF MEDICAL	:	NO. 3:15-cv-1187
EXAMINERS	:	
	:	
and	:	
	:	
FEDERATION OF STATE MEDICAL BOARDS	:	
Defendants	:	

**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS NATIONAL BOARD  
OF MEDICAL EXAMINERS AND FEDERATION OF STATE MEDICAL BOARDS**

The National Board of Medical Examiners ("NBME"), and the Federation of State Medical Boards ("FSMB"), for their answer and affirmative defenses to the amended complaint:

**ANSWER TO AVERMENTS REGARDING JURISDICTION:**

1-3. Deny each and every averment of paragraphs 1-3 of the amended complaint, deny the need to respond to the averments to the extent they are conclusions of law, except admit that plaintiff purports to invoke the jurisdiction of this court based on the statutes cited.

**ANSWER TO GENERAL ALLEGATIONS**

4. Lack knowledge and information sufficient to form a belief as to the truth of the averments of paragraph 4 of the amended complaint and, therefore, deny them.

5. Admit in part and deny in part the averments of paragraph 5 of the amended complaint; admit that the NBME and the FSMB jointly own and sponsor the USMLE, which is a standardized examination used in evaluating applicants for medical licensure in the United States, deny the remaining averments of paragraph 5, and deny the need to respond to the averments to the extent they are conclusions of law.

6. Admit the averments of paragraph 6 of the amended complaint.

7. Deny each and every averment of paragraph 7 of the amended complaint, except admit that the NBME is a private non-profit corporation with its principal place of business in Philadelphia, Pennsylvania.

8. Admit in part and deny in part the averments of paragraph 8 of the amended complaint; admit that the NBME and the FSMB jointly own and sponsor the USMLE, which is a standardized examination that is a prerequisite for medical licensure in the United States and its territories, admit that the NBME and FSMB provide for the administration of USMLE through a vendor, Prometric, Inc., deny the remaining averments of paragraph 8 and deny the need to respond to the averments to the extent they are conclusions of law.

9. Deny each and every averment of paragraph 9 of the amended complaint, except admit that FSMB is a private non-profit corporation with its principal place of business in Euless, Texas, admit that Dr. David Watt is a former Senior Vice President of the FSMB and that a power point by Dr. Watt can be found online at the link provided, and admit that the FSMB's role in the USMLE program includes participation in governance, registration and verification of eligibility of physicians applying to take USMLE Step 3, and maintenance of score history for physicians completing the USMLE.

10. Admit the averments of paragraph 10 of the amended complaint, and clarify that the Office of the USMLE Secretariat is staffed with two full time employees, a Program Officer and an Assistant Program Administrator.

11. Deny the averments of paragraph 11 of the amended complaint as stated, refer to the announcement regarding the six-attempt policy in its totality, which speaks for itself, except admit that before the change in the policy, the USMLE program did not limit the number of times an examinee could attempt to pass a Step or Step component of the USMLE. By way of further answer, the defendants attach as Exhibit 1 a portion of the 2015 USMLE Bulletin of Information ("Bulletin") describing the six attempt limit; attach as Exhibit 2 a portion of the "Frequently Asked Questions" pertaining to the six

attempt limit; and attach as Exhibit 3 an announcement posted on June 20, 2012, regarding the six attempt limit.

12. Deny each and every averment of paragraph 12 of the amended complaint, and refer to the statement in the Bulletin of the six-attempt limit in its totality, which speaks for itself.

13. Admit in part and deny in part the averments of paragraph 13 of the amended complaint, admit that if an examinee has exceeded the six attempt limit on a Step or Step component of the USMLE and nevertheless tries to register for that Step or Step component, the designated registration entity will not permit the examinee to register; admit that, among other things that are not addressed in the Bulletin, the Bulletin does not address exceptions to the six-attempt limit policy based upon the ADA or related laws, deny the remaining averments of paragraph 13, and deny the need to respond to the averments to the extent they are conclusions of law.

14. Deny the need to respond to the averments of paragraph 14 because they are conclusions of law.

15. Lack knowledge and information sufficient to form a belief as to the truth of the averments of paragraph 15 of the amended complaint, and deny the need to respond to the averments to the extent they contain conclusions of law.

16-17. Deny the need to respond to the averments of paragraphs 16-17 because they are conclusions of law.

18. Lack knowledge and information sufficient to form a belief as to the truth of the averments of paragraph 18 of the amended complaint concerning an alleged investigation by the Attorney General of "plaintiff's case that the NBME had failed to grant him reasonable testing accommodations ... beginning in 2005," admit that plaintiff failed Step 1 of the USMLE nine times, state by way of further answer that plaintiff never requested accommodations on Step 1 of the USMLE, the exam for which he has exceeded the maximum number of attempts, but rather he requested accommodations on Step 2 CS and Step 2 CK of the USMLE, and deny the need to respond to the averments to the extent they contain conclusions of law.

19. Admit in part and deny in part the averments of paragraph 19 of the amended complaint, admit that, after a thorough review, in March 2006 the NBME denied plaintiff's request for testing accommodations on Step 2 CS and Step 2 CK of the USMLE because the information presented by the plaintiff at that time did not support a finding that plaintiff suffered from a disability for which testing accommodations were warranted to access USMLE, and lack knowledge and information sufficient to form a belief as to the truth of the remaining averments of paragraph 19.

20. Deny each and every averment of paragraph 20 of the amended complaint, deny that (in 2005-2006) plaintiff submitted information sufficient to demonstrate that he suffered from a disability for which testing accommodations on Step 2 CS and Step 2 CK of the USMLE were warranted, and deny the need to respond to the averments to the extent they contain conclusions of law. By way of further answer, the defendants attach as Exhibit 4 portions of plaintiff's "Disabilities Services" file including the NBME's reasons for denying plaintiff's 2005 request for accommodations on USMLE Step 2 CS and CK.

21. Deny each and every averment of paragraph 21 of the amended complaint, deny that plaintiff submitted "additional documentation" regarding a request for accommodations on Step 1 of the USMLE because plaintiff had never previously submitted a request for accommodations on Step 1 of the USMLE, deny that material submitted in 2014 should reasonably be considered "additional documentation" to material submitted in 2005-2006, except admit that plaintiff submitted a letter and documents to the NBME on or about April 1, 2014, requesting accommodations on Step 1 of the USMLE based on a diagnosis he received in March 2013 and a request to "overturn" the six-attempt limit for taking Step 1 of the USMLE. By way of further answer, the defendants attach as Exhibit 5 some of the materials submitted by plaintiff to the NBME in 2014 and/or 2015.

22. Deny each and every averment of paragraph 22 of the amended complaint, deny all averments of discrimination, and deny the need to respond to the averments to the extent they contain conclusions of law.

23. Deny the need to respond to the averments of paragraph 23 because they are conclusions of law, or purport to quote sources that speak for themselves.

24. Deny each and every averment of paragraph 24 of the amended complaint, and deny the need to respond to the averments to the extent they contain conclusions of law or purport to quote sources that speak for themselves.

25-27. Deny the need to respond to the averments of paragraphs 25-27 because they are conclusions of law or purport to quote sources that speak for themselves.

**ANSWER TO "EXHAUSTION OF LEGAL REMEDIES"**

Deny each and every averment of paragraph IV of the amended complaint titled "Exhaustion of Legal Remedies," deny the characterization of the April 1, 2014, letter as an "appeal" or the April 20, 2014, contact as a second "appeal," deny plaintiff's characterization of the documents referenced, refer to the referenced documents in their totality which speak for themselves, deny the characterization of any policy or policies as "a form of psychological manipulation and bureaucratic

entanglement," and deny the need to respond to the averments to the extent they contain conclusions of law.

**ANSWER TO "LEGAL CLAIMS"**

Incorporate their answers to all preceding paragraphs, deny all averments of discrimination and/or wrongful conduct, and deny the need to respond to the averments to the extent they contain conclusions of law.

**ANSWER TO PRAYER FOR RELIEF**

The NBME and the FSMB respectfully request that the Court:

(a) deny plaintiff's request for a declaration that the defendants' actions violated any legal or Constitutional right of plaintiff;

(b) deny plaintiff's request for a preliminary and/or permanent injunction ordering defendants to "overturn" the six attempt limit and allow plaintiff to register for Step 1, Step 2 CK, Step 2 CS and Step 3 with the accommodation of double time;

(c) deny plaintiff's request to "wipe clean" his previous attempts to pass the USMLE Step 1 and Step 2;

(d) deny plaintiff's request for compensatory damages;

(e) deny plaintiff's request for punitive damages;

(f) deny the award of damages to plaintiff for his previous USMLE registration fees;

(g) deny any other relief to plaintiff; and



(h) deny plaintiff's request for an injunction enjoining defendant from "continuing its discrimination."

WHEREFORE, the NBME and the FSMB respectfully request that the Court deny every aspect of the relief requested by plaintiff, and award judgment in favor of the NBME and the FSMB, together with costs of suit and such other relief as the Court deems appropriate.

#### **AFFIRMATIVE DEFENSES**

##### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff's complaint fails to state a claim upon which relief can be granted.

##### **SECOND AFFIRMATIVE DEFENSE**

The defendants at all times acted for legitimate non-discriminatory reasons.

##### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claim for monetary relief is barred by law.

##### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claim for relief is barred to the extent he has failed to mitigate his damages or suffered no damages as a result of the defendants' actions.

##### **FIFTH AFFIRMATIVE DEFENSE**

At all relevant times, the defendants made good faith efforts to comply with the Americans with Disabilities Act.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, because the defendants' actions were privileged and undertaken in good faith.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the equitable doctrines of laches, waiver, estoppel, unclean hands and/or an adequate remedy at law.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the applicable statute(s) of limitations.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to punitive damages, as a matter of law.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to a jury trial under Title III of the ADA as a matter of law.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to state a claim under 42 U.S. Code § 1983 because the defendants are neither state actors nor acted under color of state law.

**TWELFTH AFFIRMATIVE DEFENSE**

The defendants reserve their right to amend their affirmative defenses to incorporate after-acquired evidence that may be obtained through discovery.

Dated: August 28, 2015

/s/ Michael E. Sacks

NEIL J. HAMBURG

MICHAEL E. SACKS

ID. NO. 32175, 39774

HAMBURG & GOLDEN, P.C.

1601 Market Street, Suite 3310

Philadelphia, PA 19103-1443

(215) 255-8590

Attorneys for Defendants  
National Board of Medical  
Examiners and Federation of  
State Medical Boards

**CERTIFICATE OF SERVICE**

I certify that the foregoing Answer to the Amended Complaint has been filed electronically pursuant to Local Rule 5.7 upon the below registered users and is now available for viewing and downloading from the Court's Electronic Case Filing System. I am also serving a copy of the foregoing by regular mail upon:

Richard Katz  
3364 Parker Lane  
East Stroudsburg, PA 18301

*Pro se*

Date: August 28, 2015

/s/ Michael E. Sacks  
MICHAEL E. SACKS